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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re D.J. et al., Persons Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

APRIL F. et al.,

Defendants and Appellants.

D043628

(Super. Ct. Nos. J514497A-B)

APPEALS from judgments of the Superior Court of San Diego County, Hideo
Chino, Referee. Affirmed.

April F. and Joseph J. (Father) separately appeal judgments terminating their
parental rights to their sons, D.J.¹ and Joseph J., under Welfare and Institutions Code

¹ Father does not have standing to appeal the judgment as to D.J., because he was never named the child's biological or presumed father. (*In re Alyssa F.* (2003) 112 Cal.App.4th 846, 855.) We nonetheless will refer to April and Father jointly as the parents and to D.J. and Joseph jointly as the children.

section 366.26.² Each parent challenges the sufficiency of the evidence terminating parental rights because each argues he or she had a beneficial relationship with the children within the meaning of the section 366.26, subdivision (c)(1)(A) exception. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2002 the San Diego County Health and Human Services Agency (the Agency) filed a section 300 petition on newborn D.J.'s behalf. The petition alleged D.J. was at risk because he tested positive for drugs at birth, April tested positive for drugs at his birth and received no prenatal care, and Father had been unable to stop April from using drugs. However, D.J. was not removed from April's custody. At the July 2002 jurisdictional and dispositional hearing, the court made a true finding on the petition, declared D.J. to be a dependent, and placed him with April. The court also ordered April to participate in the Substance Abuse Recovery Management System (SARMS). April failed to appear at the next month's SARMS review hearing and the court subsequently found her guilty of contempt of court.

In September 2002 the Agency filed a section 387 petition on D.J.'s behalf. The petition alleged the previous disposition was not protecting the child because April was not in compliance with SARMS and had tested positive for drugs. In September the Agency filed a section 300 petition on two-year-old Joseph's behalf. That petition alleged Joseph was at risk because of April's drug use. However, at the time this petition was filed, the Agency did not know the whereabouts of April or the children.

² All statutory references are to the Welfare and Institutions Code.

In October 2002 the court found that Joseph was a person described by section 300. Later that month, the court declared him to be a dependent, ordered both children removed from April's care, and ordered April to comply with the case plan. However, the Agency had still not located the children. They were found two months later.

In January 2003 the court found that Father was Joseph's presumed father. A reunification services plan for Father was subsequently put into place.

By April 2003 neither parent had made significant progress on the reunification plans and the social worker recommended terminating reunification services. At the June six-month review hearing, the court followed the recommendation and scheduled a section 366.26 hearing. The parents stopped visiting in the children September 2003.

At the January 2004 section 366.26 hearing, the court found the children were adoptable. Finding that none of the section 366.26, subdivision (c)(1) exceptions applied, the court terminated parental rights.

DISCUSSION

The parents challenge the sufficiency of the evidence supporting the findings that neither parent had a beneficial relationship with the children within the meaning of section 366.26, subdivision (c)(1)(A).

Once a court determines a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) If the trial court determines the parent has not met that burden, "[w]e must affirm . . . if the ruling is supported by substantial evidence." (*Ibid.*)

"Adoption, where possible, is the permanent plan preferred by the Legislature."
(*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds that termination would be detrimental to the child under one of five specified exceptions. (§ 366.26, subd. (c)(1).) This exception to the adoption preference applies if termination of parental rights would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."
(*Ibid.*)

A. Regular Visitation

Neither parent could establish the first prong of the section 366.26, subdivision (c)(1)(A) exception because neither maintained regular visitation with the children. Neither parent had visited the children between late September, or the beginning of October 2003³ and the time of the section 366.26 hearing in January 2004. Although April asserted she had visited the children approximately once a week since September 2003 she never told the social worker she was doing so. Further, the court apparently did not find her to be credible as to the visitation issue because it stated there were "real issues as to [the] regularity of contact." We may not reweigh that credibility determination. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) Because neither parent visited the children in the four months preceding the section 366.26 hearing, the

³ There is an inconsistency in the record as to when visits stopped. At the hearing, the social worker and Father testified visits stopped in September. However, the social worker's report indicated visits stopped after the October 1, 2003 hearing.

court properly found that they did not visit regularly within the meaning of section 366.26, subdivision (c)(1)(A). (See *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

B. Beneficial Relationship

Even if the parents had regularly visited with the children, neither demonstrated that they had a beneficial relationship with them. We have interpreted the phrase "benefit from continuing the relationship" to refer to a "parent-child" relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact or pleasant visits with the children. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from the day-to-day interaction, companionship and shared experiences." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment between child and parent. (*Ibid.*; *In re Elizabeth M.*, *supra*, 52 Cal.App.4th at p. 324.)

April contends the evidence establishes that the children had a bond with her because they had a stressful transition into long-term foster care after their removal from her care. Both children woke up several times during the night crying and Joseph asked for April. However, within one month, D.J. was sleeping through the night. Joseph continued to exhibit some emotions about his separation from April four months after his removal. However, since the time visits ended in late September or early October 2003, the children had not asked for or about their parents, from which we infer that any grief resulting from the separation had subsided.

There is also no evidence that by the time of the section 366.26 hearing either child regarded either parent in a parental role. Both children were bonded with their maternal aunt, who was their primary caretaker and was committed to adopting them. They had been in her home since December 2002.⁴ They appeared happy with her, were very affectionate toward her, and looked to her to satisfy their basic needs.

Moreover, neither parent acted in a parental role. They did not buy clothing or food for the children. They did not ask questions about the children's medical care. The parents admitted that the maternal aunt bathed the children, woke them up in the morning, dressed them, made their meals, and took them to the doctor. Further, after the visitation center stopped visitation, neither parent contacted the social worker to reinstate visits.

⁴ Although the record indicates the children had been placed with their aunt in December 2001, this must be a typographical error because the children were not removed until October 2002 and were not located until December 2002.

No expert believed a bond existed between the parents and the children. The supervisor at the visitation center believed the relationship was not parental because the children looked to their caregiver to meet their basic needs. The social worker believed the children did not have a child-parent relationship that would prevent adoption.⁵ Neither had met the children's needs or had obtained a stable and beneficial environment for the children. They had not completed counseling, parenting classes, drug treatment, or domestic violence programs. The social worker believed the children's best interests would be served by being adopted so that they could obtain a stable and committed home. Neither parent offered any contrary expert evidence. Substantial evidence supports the judgments terminating parental rights.

⁵ April challenges the social worker's opinion that the children did not have a bond with her on the ground that he never observed her with the children. However, since he took over the case, April never had an official visit for the social worker to view. She cannot now complain that he did not view visits when she did not contact him to arrange an official visit or tell him when she was visiting on an unofficial basis.

DISPOSITION

The judgments are affirmed.

AARON, J.

WE CONCUR:

McDONALD, Acting P. J.

McINTYRE, J.